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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-919

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA,
*Petitioner,*

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, ET AL.,
*Respondents.*

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, INC., IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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The National Congress of American Indians, Inc., respectfully moves this Court for leave to file the accompanying brief, as *amicus curiae,* in support of the petition for writ of certiorari filed by the Fort Belknap Indian Community.

In support of this motion, your *amicus* has stated its interest in this case in the accompanying brief. The written consent of the petitioner to presenting this brief is filed simultaneously with it. The respondents have not acted on a request for their consent.

Your *amicus* believes that its views will assist the Court in its consideration of the petition.

Respectfully submitted,

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January, 1977

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# Supreme Court of the United States

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THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA,
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THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, ET AL.,
*Respondents.*

## BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, INC., IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The National Congress of American Indians, Inc. (NCAI), is one of the oldest and most representative organizations for the promotion, preservation and protection of the interests of native Americans. A non-profit association, formed in 1944 and incorporated in 1954 in Oklahoma, NCAI's membership consists of over 120 tribes, most which are organized pursuant to

the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461 *et seq.*, and some 1,500 individual Indians. NCAI is convinced that, unless the decision below is reversed, IRA tribes will be subjected to endless civil suits for damages or other relief that will surely drain tribal treasuries and reduce to a nullity the federal policy of tribal self-determination.

## REASONS FOR GRANTING THE WRIT

The Supreme Court of Montana has created needless confusion and reached an erroneous result on an important question of the state's judicial power over an Indian tribe.[1] This time the question is not only one of jurisdiction [2] but also one of tribal sovereign immunity. Here the Court is faced with clear misreading of the language and legislative history of §§ 16 and 17 of the Indian Reorganization Act, 25 U.S.C. §§ 476 and 477, that has led the lower courts to see a waiver of

[1] The court below has been reversed by this Court twice in cases involving unauthorized state court authority over reservation Indians and tribes. *Fisher* v. *District Court,* 424 U.S. 382 (1976), and *Kennerly* v. *District Court,* 400 U.S. 423 (1971). Both reversals came through this Court's summary action on the petitions for certiorari, without further briefing or argument. The lower court has followed this Court's mandate against such improper state intrusion in Indian affairs on other occasions since *Kennerly. Security State Bank* v. *Pierre,* 162 Mont. 298, 511 P.2d 325 (1973); *Blackwolf* v. *District Court,* 158 Mont. 523, 493 P.2d 1293 (1972); and *Crow Tribe* v. *Deernose,* 158 Mont. 25, 487 P.2d 1133 (1971). But in this case and *Little Horn State Bank* v. *Stops,* 555 P.2d 211 (Mont. 1976), *certiorari pending,* No. 76-931 (U.S., filed Jan. 5, 1977), the lower court has again regressed.

[2] Petitioner tribe has never consented to, nor has the State of Montana sought to assume, jurisdiction over the Fort Belknap Reservation pursuant to 28 U.S.C. § 1360 or 25 U.S.C. § 1322(a). *See Kennerly* v. *District Court, supra* note 1.



immunity where there is none.[3] The misreading has improperly melded the petitioner's tribal governing body, created pursuant to § 16 of the Act, with its tribal corporation, organized pursuant to § 17. The lower courts have recognized only one tribal entity when Congress clearly intended two.

The tribe has both a governmental organization and a corporate organization. The governing body, reorganized by § 16 of the IRA, has retained the sovereignty which resided in the aboriginal tribes that now comprise the Fort Belknap Indian Community. Such tribal sovereigns have always been clothed with immunity from suit. *United States* v. *United States Fidelity & Guar. Co.,* 309 U.S. 506, 512 (1940), and *Turner* v. *United States,* 248 U.S. 354, 358 (1919). It is an immunity like that protecting from suit without their consent both the United States, *Monaco* v. *Mississippi,* 292 U.S. 313 (1934), and the several States, *Edelman* v. *Jordan,* 415 U.S. 651 (1974). In the case of tribal immunity, any waiver must come from Congress. *United States* v. *United States Fidelity & Guar. Co., supra,* and *Turner* v. *United States, supra.* A tribe alone cannot consent. *See Kennerly* v. *District Court,* 400 U.S. 423 (1971). The waiver must be express, as must any congressional action affecting the status of tribes with respect to state authority. *See McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 171 (1973).

[3] The misreading is implicit, even though the Montana Supreme Court here did not express its reasons for denying the Fort Belknap Community's writ to reverse and set aside the district court's order to dismiss the case. 554 P.2d at 1115 (Appendix to the Petition (App.) 1a).

In the IRA, Congress gave tribes an opportunity to reorganize into two different entities, recognizing the governing aspect of tribal authority over their lands and people and the proprietary aspect of tribal ownership of their lands and resources. Section 16 plainly speaks to the governing organization and § 17 plainly addresses the proprietary corporation. Just as the statute itself discriminates between the two concepts in separate sections, the legislative history distinguishes the purposes of creating two entities. The House Committee on Indian Affairs reported that the bill leading to the Act granted

> ". . . Indians living under Federal tutelage the freedom to organize for purposes of *local self-government* and *economic enterprise* . . . ." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 1 (1934). (Emphasis added.)

Similarly the Senate Committee stated the dual organizational purposes

> "(3) To stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations.
>
> "(4) To permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations." S. Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934).

The Solicitor of the Department of the Interior, the primary administrative agency for all federally recognized tribes, has twice held that the government and the corporation of each IRA tribe are distinct bodies with different powers and responsibilities. 65 I.D. 483, 484 (1958) and 61 I.D. 8 (1952).



Suit against an IRA tribal governing body is simply not authorized by the IRA. Yet it is that statute upon which the plaintiff below has exclusively relied in asserting a waiver of the Tribe's immunity. Plaintiff here sued the Tribe, not the tribal corporation. But the *Tribe* is immune for lack of a congressional waiver, and the tribal corporation, though it may be sued, [4] has no authority over the tribal police officer involved here. The facts of the case, involving allegations of excessive force against the plaintiff by a tribal police officer in the course of arrest and custody of the former for his supposed violation of traffic laws, are obviously totally within the governmental sphere and have no possible connection with any corporate, business or economic enterprise of the tribe.

Equally without question is the fact that, since enactment of the IRA, Congress, particularly in the past few years, has continued to strengthen tribal government through increased governmental and business programs, such as the Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.*, and the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*

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[4] No express waiver of immunity can be found with respect to either the tribal government or the tribal corporation in § 16 or § 17 of the Act, respectively. There is language in the petitioner's corporate charter purportedly authorizing the tribal corporation "to sue and be sued". This charter language was approved by the Secretary of the Interior and therefore reflects his decision that waiver of immunity was authorized by Congress with respect to the corporation. Whether or not Congress in the IRA has authorized the corporation's waiver has not been directly raised in this petition, and resolution of that issue must await another case where, unlike here, the corporate powers and not the governmental powers, are the subject of the suit.

Congress has not in any of those Acts expressly waived the immunity that bars the present case.[5] Furthermore, it is implicit from the policies of those acts that Congress would not have carelessly exposed tribal government treasuries to the repetition of costly suits for damages for acts of those sovereigns in their governing capacities.

## CONCLUSION

For the foregoing reasons, your *amicus* prays that the Court agree to review this case by granting the petition for writ of certiorari.

Respectfully submitted,

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[5] Whether or not a waiver of immunity may have been intended by the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.*, is not addressed here for the failure of the plaintiff below to rely on its provisions. In any event, the rights that Act created under federal law would not be adjudicated in a state court.